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Workmen's Compensation Act-Occupational Disease

WORKMEN'S COMPENSATION ACT—OCCUPATIONAL DISEASE—The dependents of one, Buenker, were denied compensation, under the Workmen's Compensation Act, where the evidence showed that the decedent had worked as foreman of the employer's finishing room, where paint was used, and that he died from metal poisoning as a result of an internal overdose of the paint. Decedent had not been ill before and no wilfulness, nor expectation of the poisoning, on the part of the decedent, was proven. *Held*, that the death was the result of an "occupational disease" and not an "accident", since no unusual occurrence on the day of the illness was proven.[1]

This decision brings into question the proper construction of our Act on that phrase of the subject. The part of the Act applicable to this discussion reads:[2] "Every employer and employee, except as herein stated, shall be presumed to have accepted the provisions of this act respectively to pay

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[8] *Woodruff v. R. R. Co.* (1890), 59 Conn. 63, 20 Atl. 17; *Relief Electric Light Company's Petition* (1916), 63 Pa. Super. 1; *Atlantic Coast Line R. R. v. N. C. Corp. Comm.* (1906), 206 U. S. 1, 27 Su. Ct. 585.

[9] *School City of Elwood v. The State ex rel. Griffin* (Ind., 1932), 180 N.E. 471; *Kennedy v. San Francisco Bd. of Ed.* (1890), 82 Cal. 483, 22 Pac. 1042.

[10] *Yarlott v. Brown* (1921), 192 Ind. 648, 138 N. E. 17.

[1] *Buenker v. Union Furniture Co.*, Appellate Court of Indiana, June 2, 1932, 181 N. E. 294.

[2] Burns' Ann. St. Supp. of 1929, Sec. 9447.

and accept compensation for personal injuries or death by accident arising out of and in the course of the employment. *Injury* and *personal injury* shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form except as it shall result from the injury."[3]

Does the fact that the decedent's death was the result of an "occupational disease" preclude recovery by the dependents under the Workmen's Compensation Act of Indiana? The answer to this question is the subject of this case note.

The theory of the Workmen's Compensation Act, as well stated by our court,[4] was the correction of recognized errors and abuses, in that, formerly, only cases attributable to the fault of the employer were compensable by him, whereas the Act is to place the burden on the employer, by him, to be distributed to the ultimate consumer of his product, of compensating for the economic loss attributable to the employment. In referring to the construction of the Act, our courts say:[5] "It should be liberally construed to the end that the purpose of the Legislature, by suppressing the mischiefs and advancing the remedy, be promoted, even to the inclusion of cases within the reason, although outside the letter of the statute."

To ably discuss this case, the requirements of our Compensation Act, as set forth in the Act itself and as construed by our courts, must be separately defined and applied. The following are the facts, pertinent to this case, which must appear as a basis for the award of compensation to the injured employee or his dependents: (a) that the employee receive an injury, (b) that the injury was by accident, (c) that the accident arose out of the employment, (d) that the accident occurred in the course of the employment, (e)[6] if a disease is the alleged disability, it must result from a factual situation where (a), (b), (c), and (d) exist.

"The word 'injury', as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system produces harm or pain, or a lessened facility of the natural uses of any bodily activity or capability."[7] It is submitted that in the Buenker case, the continued absorption of the metal particles into the decedent's stomach created a change in that part of his system producing harm from which the disease resulted, culminating in death. Ergo, it resulted from an injury.

It appears from the cases which deny compensation for occupational disease that they base their decision on the ground that there was no "accident." The decision under discussion omitted the citation of authorities for its position, but there is authority which could have been cited in support of the case. For instance, in one case,[8] the court affirmed a denial of compensation where the employee was injured by continually breathing air, heavy with emery dust. The court said in that case that there was no "accident" because the employee knew the dust was there and knew that that condition had caused others to become sick; therefore that there was no

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[3] Burns' Ann. St. Supp. of 1929, Sec. 9518 (d).
[4] *In re Duncan* (1920), 73 Ind. App. 270, 127 N. E. 289.
[5] *In re Duncan* (1920), 73 Ind. App. 270, 127 N. E. 289.
[6] Burns' Ann. St. Supp. 1929, Sec. 9518 (d).
[7] *Wasmuth-Endicott Co. v. Harst* (1922), 77 Ind. App. 279, 133 N. E. 609.
[8] *Moore v. Service Motor Truck Co.* (1924), 80 Ind. App. 668, 142 N. E. 19.

unusual occurrence which could be called an "accident." In another case,[9] our court affirmed a denial of compensation where the decedent was injured by the inhalation of gas and smoke, and where he had worked under the same conditions for almost a year and knew they had caused others to become sick. Again it was said that there was no "accident," as there was no unusual occurrence, since the decedent knew of the conditions under which he was working. To the writer, this kind of reasoning seems to be a reversion, in a poorly disguised form, to the common law tort doctrine of denial of recovery because of plaintiff's voluntary assumption of the risk, to rid our law of which was the purpose of the Workmen's Compensation Act. What then is the correct interpretation of the word "accident," as used in our Act? Our court has defined the term,[10] saying, "The word 'accident' is used in its popular sense and means any mishap or untoward event not expected and not designed *by the one who suffered the injury or death.*" In the above quotation the writer italicized what to him is the important part of the definition, it being the part which seems to have been overlooked by the decisions denying recovery for occupational disease on the ground that there was no "accident." These cases deny recovery because the employee knew of the conditions under which he worked, without discussing the question of whether the employee expected or designed the injury or death. They confuse the means and the end. It is the end, not the means, which must be looked to in answer of the question, "Was there an accident"? A well reasoned Indiana case,[11] in allowing recovery, says: "While it appears that the decedent had been afflicted by the poisonous gas before, it is apparent that he did not anticipate or design the serious consequences resulting in his death. Yet the evidence abundantly justifies the inference that the immediate cause of the death was the injury by the inhalation of the noxious gas." It continues, holding the injury to be by accident, saying, "an injury may be the result of accidental means though the act involving the accident was intentional."[12] Illustrating, could it be said that one, intending to drink water, drank poison and died as a result, did not die by accident. There, the act was intended, but the consequence was not at all anticipated or designed. Likewise, in the Buenker and similar cases, the act—working under conditions conducive to the development of disease—was intended, but in the absence of evidence showing that the deceased expected or designed the disease and resultant death (as in the Buenker case), the consequence was neither intended nor designed and it follows that the disease and ultimate death were a result of an injury "by accident," and therefore compensable if it arose out of and in the course of the employment.

"An accident is said to arise out of the employment when there is apparent to the rational mind, upon a consideration of all the circumstances, a casual connection between the conditions under which the work was required to be performed and the resulting injury.[13] The very nature of an

[9] *Brewer v. Veedersburg Paver Co.* (1932), 92 Ind. App. 547, 177 N. E. 74.

[10] *Furst Herber Cut Stores Co. v. Mayo* (1924), 82 Ind. App. 363, 144 N. E. 857.

[11] *General American, etc., Corporation v. Weirick et al.* (1921), 77 Ind. App. 242, 133 N. E. 391.

[12] See also *United States Casualty Co. v. Griffis* (1917), 186 Ind. 126, 114 N. E. 83.

[13] *Smith v. Leslie et al.* (1926), 85 Ind. App. 186, 151 N. E. 17.

"occupational disease" satisfies this test and there was no contention in the Buenker case that the "casual connection" requirement was not satisfied.

"An accident occurs in the course of the employment, within the meaning of the 'Workmen's Compensation Act' when it takes place within the period of the employment, at a place where the employee may reasonably be, and while he is fulfilling the duties of his employment, or is engaged in doing something incidental to it."[14] Though not pertinent to the case at hand, it may be added that the "period of employment" includes a reasonable time before and after the exact working hours, while the employee is on the employer's premises.[15] The definition of an "occupational disease" and, in fact, the term itself, includes the element that the disease was contracted during the period and at the place of the employee's occupation, and the Buenker case conceded that Buenker's "accident" occurred in the course of the employment.

Indiana cases decided more nearly in accord with the views here expressed are the following: in 1931[16] compensation was allowed where the injury was shown to have resulted from continued exposure for seven years to excessive heat in a steel mill, another case[17] affirming an award to claimant where the decedent's death resulted from the continued inhalation of noxious gas arising from molten metal, another case[18] affirming an award to claimants where the death resulted from the inhalation of gas from a tar tank where his duty called him to work for several hours; in another an award of compensation was affirmed[19] where the claimant had been a carpenter for his employer and had developed "brusitis" (housemaid's knee), because of the position he was forced to assume for so long a time in order to discharge his duties of scraping and polishing the floors.

In the light of the above discussion, it seems to the writer that the Buenker case was wrongly decided and that, regarding the purpose of the Legislature which passed the "Workmen's Compensation Act," and the terms of the aforesaid Act, as construed by our courts, the case falls fairly within its province as being compensable.

However, if our courts feel they can not, by a reasonable interpretation of our Act, bring such cases within its provisions, it is time for a legislative extension of the scope of the Act so as to include them and thereby remedy the economic and social problem which modern industrialism has forced upon us—namely, the problem of who shall make pecuniary recompense for the the toll of suffering and death which our industrialism is continually levying upon the civilized world. Wisconsin, in 1919, amended their "Workmen's Compensation Act," expressly including occupational diseases as compensable. Massachusetts makes occupational diseases compensable un-

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[14] *Jeffries et al. v. Pitman-Moore Co. et al.* (1925), 83 Ind. App. 159, 147 N. E. 919.

[15] *Jeffries et al. v. Pitman-Moore Co. et al.* (1925), 83 Ind. App. 159, 147 N. E. 919.

[16] *Chapman Price Steel Co. v. Bertels et al.* (1931), 92 Ind. App. 634, 177 N. E. 76.

[17] *General American, etc., Corporation v. Weirick et al.* (1921), 77 Ind. App. 242, 133 N. E. 391.

[18] *Steel & Tube Co. of America et al. v. Bukovac et al.* (1923), 81 Ind. App. 219, 141 N. E. 643.

[19] *Standard Cabinet Co. v. Landgrave* (1921), 76 Ind. App. 593, 132 N. E. 661.

der their Act. The English Act on the subject, from which our own was originally drafted, has been amended so as to specifically include occupational disease as compensable. This indicates the trend in accordance with modern doctrines of humanity. The necessity for compensation in the case of occupational disease is apparent. There is no reason why industry should not bear the burden of compensating for the loss which the industry has occasioned and it should not bear the burden of compensating for the loss which the industry has occasioned and it should not be able to throw off this just burden because the injured employee can not point to some unusual occurrence causing his disability. The pain and suffering occasioned by an occupational disease are, in many cases, much greater and of a more permanent character than that arising from some unusual occurrence and it seems a monstrous injustice that one is compensable while the other is not.

G. S. J.